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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Implementation of the
Telecommunications Act of 1996**

**Amendment of Rules Governing Procedures
To Be Followed When Formal Complaints Are
Filed Against Common Carriers**

To: The Commission

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CC Docket No. 96-238

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**COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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January 6, 1997

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
INTRODUCTION	1
A. Pre-Filing Procedures and Activities	2
1. Mandatory Settlement Discussions	2
2. Alternative Dispute Resolution	4
B. Service	5
C. Format and Content	5
D. Answers	6
E. Discovery	6
F. Status Conferences	8
G. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief	8
H. Damages	9
I. Cross-Complaints and Counterclaims	10
J. Replies	10
K. Motions	10
L. Confidential or Proprietary Information and Materials	11
M. Other Required Submissions	11
N. Sanctions	12
O. Other Matters	12
CONCLUSION	12

SUMMARY

CompTel welcomes the Commission's review of its formal complaint procedures. The reduced role of day-to-day regulation, coupled with the dynamic growth of the telecommunications industry, will make the Commission's formal complaint process an increasingly important tool for dispute resolution and Communications Act interpretation.

The difficult challenge raised by this rulemaking is the need to strike the proper balance between speedy administration, on the one hand, and the retention of an effective forum for dispute resolution, on the other. Clearly, the Congressional timetables imposed in the '96 Act for complaint processing were meant to provide both expedition and due process. CompTel believes that many of the proposals in the *NPRM* will bring helpful reform to the complaint process, but that some of the more extreme suggestions go too far.

In particular, the proposals to eliminate all discovery, eliminate briefs, and eliminate all reply pleadings, would so truncate the proceedings as to make them meaningless. Complainants must be allowed an opportunity to state their case; without discovery, briefs or reply pleadings of any kind, complainants would have little chance of success, regardless of the strength of their case.

These extreme measures are unnecessary, in CompTel's view, to achieve the Commission's stated objectives. The more conventional reforms and expedited procedures proposed by the *NPRM* will be sufficient to enable the Commission to meet its statutory deadlines while still according complainants' due process and a fair opportunity to obtain redress.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, offers the following comments in the above-captioned proceeding.

INTRODUCTION

In this proceeding, the Commission proposes numerous changes to the procedures governing its formal complaint process.^{1/} Some of these revisions are prompted by the requirements of the Telecommunications Act of 1996 (the "'96 Act") and others are proposed simply as methods of increasing the speed or effectiveness of formal complaint processing. As the leading association of the competitive telecommunications industry, the companies which make up CompTel's membership will be greatly affected by these rule changes.

CompTel believes that the formal complaint process will become more and more important in the coming years. The growing number of participants in the dynamic

^{1/} *Notice of Proposed Rulemaking ("NPRM")*, CC Docket No. 96-238, FCC 96-460 (released November 27, 1996).

telecommunications industry, combined with the decreasing role of day-to-day regulation, seems likely to bring increasing reliance on formal complaints as a means of Communications Act interpretation and industry dispute resolution. Consequently, CompTel welcomes the Commission's timely review of its formal complaint procedures.

In conducting this review, the Commission faces the challenge of addressing conflicting objectives. On the one hand, it is important to discourage frivolous complaints and dilatory tactics if the process is to be kept speedy, efficient and administratively manageable. At the same time, however, if formal complaints are to serve their intended purpose, procedures cannot be so truncated that they fail to serve due process. The Congressional purpose in enacting the deadlines and other requirements contained in the '96 Act was to enhance the usefulness of the complaint process to aggrieved parties. The Commission should be mindful of the tension between the goals of speedy resolution and due process as it crafts its revised procedures to ensure that it does not inadvertently reduce or impair the usefulness of the complaint process to its intended beneficiaries.

CompTel's comments on the Commission's specific proposals follow. They are organized in the same manner as the *NPRM*.

A. Pre-Filing Procedures and Activities

1. Mandatory Settlement Discussions

The Commission's concern for unnecessary or frivolous complaints motivated a proposal that complainants be required to certify that settlement discussions were undertaken

prior to the filing of the formal complaint.^{2/} CompTel has serious reservations about this proposal.

First, while CompTel does not dispute the Commission's statement of its experience that "many complaints have been filed . . . with little or no prior discussions,"^{3/} CompTel believes that the vast majority of complainants do seek to settle disputes before filing formal complaints. In almost every case, for example, discussions which led to unresolved disputes are the reason for the filing of complaints. CompTel's observation is that formal complaints typically result from failed discussions, not the absence of discussion.

This is so because most complainants are motivated to seek a settlement without FCC prompting. In nearly every case a settlement provides an acceptable result faster, cheaper and without the uncertainty of outcome which accompanies a formal complaint.

In support of the proposal in the *NPRM*, however, it might be argued that if a complainant has tried and failed to settle a dispute before filing, the new requirement poses no burden or impediment. Unfortunately, this is untrue. The cases where FCC assistance is needed the most are often the ones which are least amenable to settlement discussions. In particular, where interim relief is required to prevent a termination of service or to direct a continuation of some other vital activity, mandatory settlement discussions sometimes would require a complainant to reveal its vulnerable position and be forced to accept an unfavorable settlement simply to stay in business.

Moreover, other than foreclosing the filing of complaints, this new requirement would provide another basis for procedural disputes within the complaint proceeding.

^{2/} *NPRM* at ¶ 28.

^{3/} *Id.* at ¶ 27.

Undoubtedly, with this rule in place a defendant's first action would be to move to dismiss for failure to adequately seek settlement before filing. The Commission will then be forced to adjudicate yet another time-consuming procedural dispute.

This problem highlights the fact that, in many cases, a defendant has no motivation to settle. A resale carrier's dispute with its network provider over the applicability of certain charges, for example, creates very little pressure on the underlying carrier to compromise. By requiring the complainant to seek settlement, but not the defendant, the Commission would simply further weaken the bargaining position of the aggrieved party.

Finally, the *NPRM's* textual discussion is not mirrored by proposed new rule 1.721(a)(8). The *NPRM* proposal is that a complainant "certify that it discussed, *or attempted to discuss* settlement."^{4/} Rule 1.721(a)(8), however, omits attempts to discuss settlement, stating only that the "complainant *has discussed* the possibility of settlement with each defendant."^{5/} The language of the proposed rule thus is even more cumbersome for complainants than the *NPRM's* intent.

2. Alternative Dispute Resolution

While CompTel believes a mandatory certification of attempted settlement is unnecessary and counterproductive, it supports the Commission's goal of encouraging settlement outside the formal complaint process. Rather than merely directing the parties to try and compromise, however, the Commission should seek to make its alternative dispute resolution procedures more effective. In particular, the Commission should offer to provide

^{4/} Id. at ¶ 28.

^{5/} Id. at Appendix A p. 3.

binding arbitration for dispute resolution *outside the formal complaint process*. Where complaints are filed and the parties both agree voluntarily to submit the dispute to binding arbitration, the Commission could dismiss the complaint and conduct the arbitration as a separate proceeding. FCC administrative law judges could be offered as experienced and knowledgeable arbitrators. The more flexible procedures and timetables of an arbitration would assist the parties, in many cases, and reduce the overload of complaints at the same time.

B. Service

CompTel supports the proposed change to require complainants to serve defendants directly with formal complaints. In order to ensure that proper service has been accomplished, CompTel proposes that the Commission continue to send notices to defendants of formal complaints received. While this FCC letter would no longer be the formal service document, it would give early warning if proper notice was not effectuated.

CompTel also supports the proposal to implement a formal complaint intake form. Such a standardization of basic information will serve to expedite processing. Further, CompTel supports the proposal to require all subsequent document exchanges to be by facsimile or overnight delivery.

C. Format and Content

CompTel generally supports the Commission's proposed new rules for the format and content of formal complaints. The requirements for appending supporting documents, including a detailed explanation of the alleged violation of the Act, attaching proposed findings of fact and conclusions of law, and supporting legal analysis and submitting lists of

individuals and documents relevant to the dispute, are all positive changes which will serve to narrow and speed the process.

However, CompTel opposes any prohibition on making assertions "upon information and belief." Often a complainant lacks access to important information which is in the sole control of the defendant. Without the ability to plead upon information and belief, many legitimate complaints would be dismissed. This is especially true in view of the fact that no discovery will have been available at this stage of the proceeding.

D. Answers

CompTel does not object to the proposed reduction in the time to file an Answer to a formal complaint from 30 to 20 days.

E. Discovery

CompTel agrees with the *NPRM* that discovery usually is the most contentious and protracted part of the formal complaint process. It further supports the Commission's intent to streamline the discovery process to the extent possible. CompTel is concerned, however, that the *NPRM* proposals go too far in some cases and jeopardize the underlying purpose of the complaint process. For that reason, CompTel strongly opposes the suggestion that discovery be eliminated entirely.

The discovery effort is the most contentious aspect often because it is the most critical part of the proceeding. Especially in cases where one party has sole possession of crucial facts, without discovery there will be no ability to prosecute a complaint -- and due process will have been denied. Discovery cannot be overly abbreviated or limited if the

congressional intent in mandating speedy adjudication is to be realized. Complainants were meant to be given speedy relief, not denied the ability to prove their case.

Current discovery procedures limit each party to 30 written interrogatories. Today most interrogatories elicit routine objections which necessitate a staff conference to rule on the objections, followed by a further period for preparation of written responses where objections are denied. While this system provides only limited discovery, CompTel agrees that it takes longer than necessary.

The schedule proposed by the *NPRM*, however, is unrealistic. The Answer would be due 20 days after the complaint and a status conference would be held 10 days after the Answer. Under the proposal, all objections to interrogatories would be required to be submitted for ruling by the time of this status conference. This simply is not feasible.

Defendants will find it difficult to even propound interrogatories within 10 days of filing the Answer; to then require complainants to have received them and prepared objections is impossible. The inevitable result of such a timetable will be that both parties will object to every interrogatory simply because they will not have time to analyze the issues properly. That is not the increased efficiency the Commission seeks.

A better approach would be to hold the status conference 30 days after the Answer is filed and limit the time to respond to interrogatories for which objections are denied. Because the time needed to respond can vary greatly depending upon the nature of the information, the staff should be given discretion to set the response times following the denial of objections.

The proposal to identify or file relevant documents with the complaint and answer should be adopted, but the proper sequence is to identify the documents in the complaint or

answer if they are too lengthy or are also in the possession of the other party. The suggestion that all documents be scanned onto a diskette is too burdensome at this time. Many smaller complainants may not have access to scanning technology and most other parties will want the information in paper form anyway. A requirement for scanning thus would merely add an unnecessary and time-consuming step to the process.

CompTel believes the proposal to have the parties agree to a cost recovery mechanism is unrealistic. Rather than establishing a mechanism for voluntary agreement, this proposal would be more likely to create yet another set of disputes for the Commission to address. Each party should bear their own costs of discovery, except that the Commission could set a reasonable copying fee for responses to lengthy document requests.

CompTel supports the proposal to refer certain factual issues to administrative law judges. This approach could both enhance due process and expedite resolution of disputes if employed properly.

F. Status Conferences

CompTel has no objection to a status conference 10 days after the Answer is filed except for its previous discussion about the timing of a ruling on objections to interrogatories. Either a second conference for that purpose should be held 30 days after the Answer, or the initial conference should not be held until that time.

G. Cease, Cease-and-Desist Orders and Other Forms of Interim Relief

CompTel is concerned that the Commission has misread the existing precedents on FCC powers under Section 312 to issue cease and desist orders. In *General Telephone Company of California v. FCC*, it was expressly held that the Commission's Section 312

powers to issue interim orders applies to Title II of the Act.^{6/} This power is of special importance because it often is necessary for a complainant to seek interim relief or its entire case will be mooted. Prevention of service termination, for example, provides such a situation. In its effort to avoid the potential delay caused by compliance with Section 312(c), the Commission should not ignore prior precedent and interpret the scope of Section 312(a) too narrowly.

The standard to be applied in considering requests for interim relief is that cited in the *NPRM*^{7/} and commonly used for stay motions. Bonds also may be required of complainants to protect against abuses of the interim relief process where necessary.

H. Damages

CompTel supports the proposal to bifurcate liability and damage issues so long as the complainant agrees to such separation. A forced bifurcation, however, could seriously impair a complainant's rights by causing undue delay in certain circumstances. Where a complainant submits to this approach voluntarily, however, no such danger exists.

CompTel is puzzled by the proposal that "the Commission's adjudication of damages end with a determination about the sufficiency of the computation submitted by the complainant rather than a finding as to the exact amount of damages."^{8/} This suggestion would likely do more harm than good.

^{6/} 413 F.2d 390 (D.C. Cir. 1969), *cert denied*, 396 U.S. 888.

^{7/} *NPRM* at ¶ 61.

^{8/} *Id.* at ¶ 66.

To the extent that a Commission ruling on the computation ends all issues related to the matter of damages, it seems to save nothing. To the extent such a ruling leaves issues open, it presents a very real potential for the proceeding (or at least the dispute) to drag on indefinitely. This would deny the complainant the benefit of the expedited procedures which Congress sought to create.

I. Cross-Complaints and Counterclaims

CompTel supports the proposals dealing with cross-complaints and counterclaims.

J. Replies

CompTel does not object to the elimination of replies to answers if briefs and reply briefs are still permitted. To the extent the Commission seeks to make briefing part of the complaint and answer process, however, CompTel strongly advocates retention of replies to answers. Without any ability to reply of any sort, complainants will be denied due process and the benefits of expedition will be lost.

CompTel does oppose elimination of replies to oppositions to motions. Such replies typically are filed within only a few days and are only a few pages long; thus their elimination saves little time or administrative burden. On the other hand, a reply to an opposition often is necessary to address matters raised for the first time in the opposition.

K. Motions

CompTel generally supports the *NPRM* proposals on motions, with the caveat that replies should be permitted as discussed above.

L. Confidential or Proprietary Information and Materials

CompTel does not object to the Commission's proposal for treatment of proprietary materials. To prevent delay caused by disputes, however, the Commission also should devise a standard form of protective order to make such information available under seal. This will eliminate the delay caused by the frequent need to draft such an agreement.

M. Other Required Submissions

CompTel is skeptical of the value of any joint statement of stipulated facts and key legal issues. It seems unlikely that any item denied by the Answer will be stipulated five days later, nor will anything admitted later be denied. The procedure used by the Eastern District of Virginia in this regard is valuable in that context because (a) the federal courts still use only "notice" pleading and (b) stipulation of facts in a trial-type setting is especially important to expedition. Where the Complaint and Answer are thoroughgoing documents, and no trial is contemplated, this step will add nothing.

CompTel believes very strongly that briefing must be continued. Briefs represent the complainant's and defendant's key statement of their cases and the law underlying their positions. Without these, the entire process becomes meaningless. The Commission should not, for the sake of speed, abandon the very purpose of the formal complaint process.

For this same reason, reply briefs should be retained. The essence of the ability to bring a complaint is the right to state your case. Without replies, that opportunity is denied.

CompTel does not object, however, to the staff being given the authority to set the briefing schedule. In most cases briefs can be filed within 20 days after discovery closes, with replies 10 days later.

N. Sanctions

CompTel does not object to the proposals for sanctions.

O. Other Matters

CompTel agrees that a Bureau determination satisfies the requirements of Section 271(d)(6)(B).

CONCLUSION

As day-to-day regulation of the telecommunications industry decreases, the Commission has placed greater reliance on the Section 208 complaint process. In addition, the '96 Act created several new areas of adjudication for the Commission and imposed stringent deadlines to ensure timely processing of these complaints. This proceeding seeks ways to handle more complaints in a shorter time.

The dilemma facing the Commission here is to find ways to eliminate unnecessary steps and delays in the complaint process without impairing any significant rights of the parties at the same time. The more extreme of the *NPRM's* proposals -- elimination of discovery, elimination of briefs, elimination of replies -- in combination would result in a procedure so truncated as to be meaningless. Rather than providing a means of speedy justice, this approach would create substantial injustice by eliminating due process and a fair opportunity for obtaining redress of grievances.

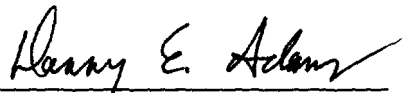
CompTel believes that the Commission can meet its new statutory deadlines without sacrificing the essence of the formal complaint process. By adopting and enforcing tight deadlines, removing unnecessary steps, and keeping the issues narrowed and the parties

focused, the Commission can ensure that it meets its dual responsibilities to be timely and to provide a useful forum for dispute resolution.

Respectfully submitted,

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